

)	Case No.: 11-CV-02509-LHK
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IN RE: HIGH-TECH EMPLOYEE)	
ANTITRUST LITIGATION)	ORDER DENYING DEFENDANTS'
)	INDIVIDUAL MOTIONS FOR
)	SUMMARY JUDGMENT
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THIS DOCUMENT RELATES TO:)	
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ALL ACTIONS)	
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323. To meet its burden, “the moving party must either produce evidence negating an essential element of the nonmoving party’s claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial.” *Nissan Fire & Marine Ins. Co. v. Fritz Companies, Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000) (citation omitted). Once the moving party has satisfied its initial burden of production, the burden shifts to the nonmoving party to show that there is a genuine issue of material fact. *Id.* at 1103. Importantly, at the summary judgment stage, the Court must view the record “in the light most favorable to the non-moving party.” *Brown v. City of Los Angeles*, 521 F.3d 1238, 1240 (9th Cir. 2008).

The critical case for the legal standard to be applied to motions for summary judgment in antitrust cases is *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), a case that challenged Japanese manufacturers’ lowering of prices as anti-competitive. In *Matsushita*, the Supreme Court held that “a plaintiff seeking damages for a violation of § 1 [of the Sherman Act] must present evidence ‘that tends to exclude the possibility’ that the alleged conspirators acted independently.” *Id.* at 588. Under *Matsushita*, if Defendants can show a plausible and justifiable reason for their conduct that is consistent with proper business practice, Plaintiffs “must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed [plaintiffs].” *Id.* The Ninth Circuit has interpreted *Matsushita* to mean that where a defendant has demonstrated a plausible business reason for its conduct, “a plaintiff who relies solely on circumstantial evidence of conspiracy . . . must produce evidence tending to exclude the possibility that defendants acted independently.” *In re Citric Acid Litig.*, 191 F.3d 1090, 1096 (9th Cir. 1999). The Second Circuit, in 2012, interpreted *Matsushita* and *Citric Acid* as follows: “[*Matsushita*] further holds that the range of inferences that may be drawn . . . depends on the plausibility of the plaintiff’s theory. Thus, where a plaintiff’s theory of recovery is implausible, it takes ‘strong direct or circumstantial evidence’ to satisfy *Matsushita*’s ‘tends to exclude’ standard. By contrast, broader inferences are permitted, and the ‘tends to exclude’ standard is more easily satisfied, when the conspiracy is economically sensible for the alleged conspirators to undertake and ‘the challenged activities could

1 not reasonably be perceived as procompetitive.” *In re Publ’n Paper Antitrust Litig.*, 690 F.3d 51,
2 63 (2d Cir. 2012) *cert. denied*, 133 S. Ct. 940 (2013).

3 The Court finds that in light of the summary judgment standard as viewed through the lens
4 of *Matsushita* and its progeny, Plaintiffs have presented sufficient evidence that tends to exclude
5 the possibility that Defendants acted independently even if Defendants satisfied the first prong of
6 *Matsushita* by showing a plausible and justifiable reason for their conduct that is consistent with
7 proper business practices. The Court need not determine whether Defendants have met their burden
8 with respect to *Matsushita*’s first prong, because the Court finds that Plaintiffs have satisfied their
9 burden of providing “specific evidence tending to show that [Defendants were] not engaging in
10 permissible competitive behavior.” *Citric Acid Litig.*, 191 F.3d at 1094.

11 Here, as Edward Catmull (Pixar President) noted, it was economically sensible for the
12 alleged conspirators to undertake the alleged conspiracy, because solicitation “messes up the pay
13 structure.” Catmull Depo. at 179. As George Lucas (former Lucasfilm Chairman of the Board and
14 CEO) stated, “we cannot get into a bidding war with other companies because we don’t have the
15 margins for that sort of thing.” Lucas Depo. at 44. Further, as Meg Whitman (former CEO of eBay)
16 said to Eric Schmidt (Google Executive Chairman, Member of the Board of Directors, and former
17 CEO), “Google is the talk of the Valley because [Google is] driving up salaries across the board.”
18 Cisneros Decl., Ex. 872.

19 In light of this backdrop, the Court will now review some of the evidence that tends to
20 exclude the possibility that Defendants acted independently. Defendants have conceded that there
21 were a series of six bilateral agreements for the purpose of these motions: Pixar-Lucasfilm, Apple-
22 Adobe, Apple-Google, Apple-Pixar, Google-Intuit, and Google-Intel. All six of these agreements
23 contained nearly identical terms, precluding each pair from affirmatively soliciting *any* of each
24 other’s employees. ECF No. 531, October 24, 2013 Order Granting Plaintiffs’ Supplemental
25 Motion for Class Cert. (“October Class Cert. Order”) at 30. Defendants’ experts concede that they
26 are unaware of these types of long-term, all-employee agreements ever occurring between other
27 firms. *See, e.g.*, Talley Depo. at 35.
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1 In addition, there is evidence that Defendants themselves recognized the similarities
2 between the agreements. For example, in an email, Lori McAdams (Pixar Vice President of Human
3 Resources and Administration), stated that “effective now, we’ll follow a gentleman’s agreement
4 with Apple that is similar to our Lucasfilm agreement.” October Class Cert. Order at 26. Moreover,
5 Google maintained an explicit do-not-cold-call list that grouped Apple, Intel, and Intuit together.
6 ECF No. 187, Ex. 29. Defendants also recognized that these agreements were not designed for
7 circulation, and tried to ensure that the agreements were known only to recruiters and executives
8 who had to enforce them. For example, Eric Schmidt (Google Executive Chairman, Member of the
9 Board of Directors, and former CEO) instructed one of his executives that Mr. Schmidt preferred
10 that the do-not-cold-call list be shared “verbally, since I don’t want to create a paper trail over
11 which we can be sued later.” *Id.* at 27. Similarly, in response to a question from an Intel recruiter,
12 Paul Otellini (CEO of Intel and Member of the Google Board of Directors) stated regarding the
13 Intel-Google agreement “we have a handshake ‘no recruit’ between eric [Schmidt] and myself. I
14 would not like this broadly known.” *Id.* at 28.

15 Furthermore, there is evidence that many of the Defendants knew about each other’s anti-
16 solicitation agreements. For example, according to Edward Catmull (Pixar President), Steve Jobs
17 (Co-Founder, Former Chairman, and Former CEO of Apple, Former CEO of Pixar) “knew and
18 understood” the Lucasfilm-Pixar agreement. Catmull Depo. at 61. Similarly, Eric Schmidt of
19 Google testified that it would be “fair to extrapolate,” based on Mr. Schmidt’s knowledge of Mr.
20 Jobs, that Mr. Jobs “would have extended [anti-solicitation agreements] to others.” Schmidt Depo.
21 at 169. Google recruiters were familiar that Apple and Adobe had an agreement. Flynn Depo. at 65.
22 Paul Otellini (CEO of Intel and Member of the Google Board of Directors) was told by Eric
23 Schmidt (Google Executive Chairman, Member of the Board of Directors, and former CEO) and
24 Sergey Brin (Google Co-Founder) about the Apple-Google agreement. Brin Depo. at 74; Schmidt
25 Depo. at 126. Intel’s own expert testified that Mr. Otellini was likely aware of Google’s other
26 bilateral agreements by virtue of Mr. Otellini’s membership on Google’s board. Snyder Depo. at
27 258. In fact, in its Motion, Intel concedes for the purposes of the instant motions that Mr. Otellini
28 knew the contents of Google’s do-not-cold-call list, which included Apple and Intel. Intel MSJ at 4.

1 Next, these agreements were negotiated by a small group of intertwining high-level
2 executives at the Defendant firms. For example, Steve Jobs (Co-Founder, Former Chairman, and
3 Former CEO of Apple, Former CEO of Pixar) was personally involved in Apple’s anti-solicitation
4 agreements with Adobe, Google, and Pixar. With regard to Apple’s agreement with Google, Mr.
5 Jobs contacted Sergey Brin (Google Co-Founder) directly, which led Mr. Brin to recognize that
6 “[b]asically, [Mr. Jobs] said ‘if you hire a single one of these people that means war.’” Cisneros
7 Decl., Ex. 1871. The next day, Bill Campbell (Chairman of Intuit Board of Directors, Co-Lead
8 Director of Apple, and advisor to Google), a friend of Mr. Jobs, informed Mr. Jobs that “Eric
9 Schmidt told me that he got directly involved and firmly stopped all efforts to recruit anyone from
10 Apple.” Cisneros Decl., Ex. 199. Moreover, it was upon Mr. Campbell’s suggestion that Google
11 agreed to enter into its anti-solicitation agreement with Intuit, of which Mr. Campbell was Board
12 Chairman. Cisneros Decl., Ex. 597.

13 As discussed in some detail in this Court’s October Class Certification Order, the same
14 small group of intertwining high-level executives were involved in strictly enforcing the
15 agreements. For example, when a Google recruiter contacted an Apple engineer, Steve Jobs (Co-
16 Founder, Former Chairman, and Former CEO of Apple, Former CEO of Pixar) forwarded the
17 message to Eric Schmidt (Google Executive Chairman, Member of the Board of Directors, and
18 former CEO), who had the recruiter terminated within the hour. *Id.* at 36. Bill Campbell (Chairman
19 of Intuit Board of Directors, Co-Lead Director of Apple, and advisor to Google) similarly emailed
20 Sergey Brin (Google Co-Founder), stating that “Steve Jobs called me again and is pissed that we
21 are still recruiting his browser guy.” *Id.* at 36. Paul Otellini (CEO of Intel and Member of the
22 Google Board of Directors) similarly forwarded an email regarding recruitment of an Intel
23 employee by a Google recruiter to Mr. Schmidt, Google’s CEO, who responded by saying that, “If
24 we find that a recruiter called into Intel, we will terminate the recruiter.” *Id.* at 37.¹ Edward
25 Catmull (Pixar President) similarly had direct discussions with Steve Jobs regarding whether Pixar
26 could communicate with specific individual Apple employees. *Id.* at 37-38. Bill Campbell

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28 ¹ In an email to Mr. Campbell, Mr. Schmidt indicated that he directed a for-cause termination of
another Google recruiter, who had attempted to recruit an executive of eBay, which was on
Google’s do-not-cold-call list. Cisneros Decl., Ex. 872.

1 (Chairman of Intuit Board of Directors, Co-Lead Director of Apple, and advisor to Google) was
2 also part of enforcing the Google-Intel agreement, because Mr. Campbell in communication with
3 Google's executives agreed that Google should call Paul Otellini (CEO of Intel and Member of the
4 Google Board of Directors) before making an offer to an Intel employee. October Class Cert. Order
5 at 28. That the agreements were entered into and enforced by a small group of intertwining high-
6 level executives bolsters the inference that the agreements were not independent.

7 Moreover, there is evidence that the Defendants shared confidential compensation
8 information with each other despite the fact that they considered each other competitors for talent.
9 For example, Adobe saw itself as in a talent war with Google and Apple and that Adobe was in a
10 six-horse compensation race against Google, Apple, Intuit, and three others. *Id.* at 47. Apple also
11 viewed Google and Intel as peer companies in terms of competition for talent. *Id.* at 48. Adobe
12 benchmarked its compensation against Google, Apple, and Intel, while Google compared its
13 compensation to Apple, Intel, Adobe, and Intuit; and Intel benchmarked against Apple and Google.
14 *Id.* at 47-48. The evidence shows that HR personnel at Intuit and at Adobe were communicating
15 about "**confidential**" information regarding how much compensation each firm would give and to
16 which employees that year. Cisneros Decl., Ex. 2812 (emphasis in original). Adobe and Intuit
17 shared confidential compensation information even though the two companies had no bilateral anti-
18 solicitation agreement, and Adobe viewed Intuit as a competitor in a six-horse compensation race.
19 Meanwhile, Google circulated an email that expressly discussed how its "budget is comparable to
20 other tech companies" and compared the precise percentage of Google's merit budget increases to
21 that of Adobe, Apple, and Intel. Cisneros Decl., Ex. 621. Google had Adobe's precise percentage
22 of merit budget increases even though Google and Adobe had no bilateral anti-solicitation
23 agreement. Paul Otellini (CEO of Intel and Member of the Google Board of Directors) similarly
24 circulated information regarding peer companies' bonus plans that he "lifted from Google."
25 Cisneros Decl., Ex. 463. This Google document discusses bonuses at Apple and Intel. A reasonable
26 jury could infer that this confidential information could be shared safely by competitors only
27 because the anti-solicitation agreements squelched true competition.
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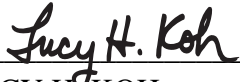
1 Finally, there is evidence that Defendants, through many of the same executives who
2 negotiated and enforced the agreements at issue in this case, expanded and attempted to expand the
3 anti-solicitation agreements to non-Defendants, which undermines Defendants' claim of
4 independent bilateral agreements. For example, Steve Jobs (Co-Founder, Former Chairman, and
5 Former CEO of Apple, Former CEO of Pixar) called Edward Colligan (former President and CEO
6 of Palm) to ask Mr. Colligan to enter into an anti-solicitation agreement and threatened patent
7 litigation against Palm if Palm refused to do so. Colligan Decl. ¶¶ 6-8. This was similar to Mr.
8 Jobs' negotiation of the agreement with Adobe, which resulted from Mr. Jobs' threat to start
9 aggressively recruiting Adobe's employees absent such an agreement. Bill Campbell (Chairman of
10 Intuit Board of Directors, Co-Lead Director of Apple, and advisor to Google), in his capacity as an
11 advisor to Google, unsuccessfully sought to expand Google's anti-solicitation agreements to
12 Facebook by responding to an email about Facebook's solicitation of Google's employees with
13 "Who should contact Sheryl [Sandberg] (or Mark [Zuckerberg]) to get a cease fire? We have to get
14 a truce." Mr. Chizen of Adobe, in response to discovering that Apple was recruiting employees of
15 Macromedia (a separate entity that Adobe would later acquire), helped ensure, through an email to
16 Mr. Jobs, that Apple would honor Apple's pre-existing anti-solicitation agreements with both
17 Adobe and Macromedia after Adobe's acquisition of Macromedia. Cisneros Decl., Exs. 1808,
18 1812. These expansions and attempted expansions of the anti-solicitation agreements suggest that
19 the agreements were not isolated, independent bilateral agreements, but rather were part of a
20 broader conspiracy.

21 In sum, the Court does not determine at the summary judgment stage which side should
22 prevail. Rather, the Court's task is only to determine whether the Plaintiffs have presented
23 sufficient evidence to warrant adjudication by a jury. For the reasons stated, the Court answers this
24 question in the affirmative. The similarities in the various agreements, the small number of
25 intertwining high-level executives who entered into and enforced the agreements, Defendants'
26 knowledge about the other agreements, the sharing and benchmarking of confidential
27 compensation information among Defendants and even between firms that did not have bilateral
28 anti-solicitation agreements, along with Defendants' expansion and attempted expansion of the

1 anti-solicitation agreements constitutes evidence, viewed in the light most favorable to Plaintiffs,
2 that tends to exclude the possibility that defendants acted independently, such that the question of
3 whether there was an overarching conspiracy must be resolved by a jury. Accordingly, each of the
4 Defendants' individual motions for summary judgment is DENIED.

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6 **IT IS SO ORDERED.**

7 Dated: March 28, 2014



LUCY H. KOH
United States District Judge